

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

| | | |
|--|---|--------------------|
| RON HOWELL |) | |
| Claimant |) | |
| VS. |) | |
| |) | |
| STAR LUMBER AND SUPPLY COMPANY, INC. |) | Docket No. 202,338 |
| Respondent |) | |
| AND |) | |
| |) | |
| INDIANA LUMBERMANS MUTUAL INSURANCE CO. |) | |
| Insurance Carrier |) | |

ORDER

Respondent and its insurance carrier requested review of the Award entered by Administrative Law Judge John D. Clark on June 11, 1996. The Appeals Board heard oral argument on December 11, 1996, in Wichita, Kansas.

APPEARANCES

Claimant appeared by his attorney, Michael L. Snider of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Douglas C. Hobbs of Wichita, Kansas.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award. In addition, by agreement of the parties, the Appeals Board also reviewed and considered the deposition of Jeanette Salone, M.D., taken March 25, 1996 on behalf of respondent.

ISSUES

The Administrative Law Judge entered an Award for permanent partial disability benefits based upon a 62.5 percent work disability. Respondent appealed that Award and argues claimant is entitled a work disability of no more than 45.75 percent. The nature and extent of claimant's disability is the sole issue before the Appeals Board.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire file and having considered the briefs and arguments of the parties, the Appeals Board finds that the claimant met his burden of proving a work disability of 62.5 percent and the Award of the Administrative Law Judge should be affirmed.

The parties stipulated the claimant suffered personal injury by accident arising out of and in the course of his employment with respondent on February 7, 1995. Claimant worked for respondent as a carpet layer. He injured his back while carrying a roll of carpet down stairs. Since then he has been unable to continue his regular job duties as a carpet layer and has not been able to find employment paying a wage comparable to that which he was earning at the time of his accident. Accordingly, claimant seeks a work disability award in excess of his stipulated 5.3 percent impairment of function. Claimant's right to permanent partial disability benefits is governed by K.S.A. 44-510e(a) which provides in part:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury."

The above-quoted language in K.S.A. 44-510e(a) requires the percentage loss of task-performing ability to be expressed "in the opinion of the physician." Although the opinions of the claimant's treating physicians were not obtained, the record in this case does contain the opinion testimony of two examining physicians. Claimant was evaluated by Jeanette Salone, M.D., at the request of his attorney. Dr. Salone diagnosed claimant with chronic lumbar strain and chronic right piriformis muscle strain. The restriction recommended by Dr. Salone was that claimant not lift over 100 pounds without assistance. The task list prepared by claimant's attorney containing nine tasks claimant had performed in the 15-year period preceding the accident was reviewed by Dr. Salone. Respondent contends Dr. Salone was of the opinion claimant could no longer perform only one of the nine tasks for an 11 percent loss of task-performing ability. However, two of the remaining ten tasks required lifting in excess of 100 pounds and, therefore, could only be performed with assistance. The record suggests such assistance would not always be available.

Claimant was also examined at the request of his attorney by Lawrence R. Blaty, M.D. The restrictions recommended by Dr. Blaty included maximum lifting and carrying of no more

than 50 pounds occasionally, 20 pounds frequently, or 10 pounds constantly. Dr. Blaty also recommended claimant be limited to occasional bending or twisting activities. Dr. Blaty opined that claimant was unable to perform seven of the nine tasks he performed in the 15 years prior to his injury. This represents a 78 percent tasks loss.

The Administrative Law Judge awarded claimant permanent partial disability compensation for a 62.5 percent work disability based upon Dr. Blaty's 78 percent tasks loss and a 47 percent wage loss. The Administrative Law Judge did not consider the deposition of Dr. Salone as it was not included in the administrative file at the time of the Award. Respondent argues equal weight should be given to the opinions of Dr. Salone and Dr. Blaty. Both physicians examined claimant at the request of his attorney. Neither physician was claimant's treating physician. Rather, both physicians saw claimant on one occasion for the purposes of an independent medical examination. An average of the 78 percent tasks loss opinion of Dr. Blaty and the 11 percent tasks loss of Dr. Salone would result in a 44.5 percent loss of task-performing ability.

Claimant argues the testimony given by Dr. Salone should be discounted. She saw claimant on only one occasion. At that time claimant was off work receiving temporary total disability compensation. He had not reached maximum medical improvement and was still under the care of the authorized treating physician. Claimant points out that although three treating physicians, Dr. Ron Davis, Dr. Jacob Amrani, and Dr. Kay Becker found claimant had an absent ankle jerk reflex, Dr. Salone did not make that finding. After reviewing the medical records from the treating physicians at her deposition, Dr. Salone agreed that a pinched nerve from a herniated disk can cause different findings at different times. Dr. Salone also agreed that an absent ankle jerk reflex is significant because it can be due to nerve impingement. Such a finding could result in a differential diagnosis of S-1 radiculopathy. Claimant's counsel also pointed out that claimant was not working at the time he was examined by Dr. Salone and that spinal epidural injections with pain medication had been given to claimant at a point prior to his examination by Dr. Salone. With this information, Dr. Salone opined that it would be consistent for claimant not to be as symptomatic when she saw him as when claimant was first examined by Dr. Davis and found to have an absent ankle jerk reflex. In addition, Dr. Salone had not been aware of Dr. Amrani's findings after claimant had attempted to return to work. Based upon the absent ankle jerk reflex, Dr. Amrani had recommended an MRI and discussed with claimant the possibility of surgery should such testing confirm a herniated disk. For these reasons, claimant argues that Dr. Salone's 100-pound weight restriction is unrealistic and unsupported by Dr. Salone's own testimony. Dr. Salone testified it would be difficult for her to say what work restrictions she would have placed upon claimant in January 1996 with the findings shown in Dr. Amrani's report. She did agree, however, that someone with a herniated disk should not be lifting weights of 100 pounds.

The Appeals Board finds the work restrictions recommended by Dr. Salone to be unrealistic given claimant's chronic symptoms and objective findings of nerve root impingement. In addition, Dr. Salone's restrictions were given at a time before claimant had reached maximum medical improvement. Accordingly, Dr. Salone's opinions concerning claimant's tasks loss should be disregarded as they are premised upon those restrictions. Furthermore, on cross-examination Dr. Salone questioned claimant's ability to perform certain

of those tasks which she had included as being among the tasks claimant retained the ability to perform.

Prior to his injury, claimant's average weekly wage was \$527.42. Claimant was subsequently offered an accommodated position by respondent which would have paid \$7.00 per hour or \$280 per week. Claimant refused this offer. Claimant subsequently obtained employment paying \$4.50 per hour or \$180 per week. After the regular hearing, the Administrative Law Judge accepted into evidence a letter from claimant's counsel dated March 5, 1996 which indicated claimant had accepted full-time employment paying him \$7.00 per hour or \$280 per week. Comparing the \$280 per week claimant is earning to the gross average weekly wage claimant was earning with respondent, calculates to a wage loss of 47 percent. This is the percentage the Administrative Law Judge found to be claimant's wage loss. Respondent argues that the Appeals Board should affirm that finding. Claimant does not dispute that the evidence in the record supports a 47 percent wage loss. Accordingly, the Appeals Board will adopt the finding of the Administrative Law Judge in this regard. Combining the 78 percent tasks loss with the 47 percent wage loss results in a permanent partial disability of 62.5 percent. The Award by the Administrative Law Judge should, therefore, be affirmed.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge John D. Clark dated June 11, 1996, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of December 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Michael L. Snider, Wichita, KS
Douglas C. Hobbs, Wichita, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director

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ORDER

Claimant appeals from a November 7, 1996, post-award Order by Administrative Law Judge John D. Clark denying claimant's Motion to Quash Respondent's Motion for Review and Modification. The Appeals Board heard oral arguments December 11, 1996, in Wichita, Kansas.

ISSUES

The Administrative Law Judge entered a final Award for permanent partial disability compensation on June 11, 1996. That Award was timely appealed to the Appeals Board. During the pendency of that appeal, respondent filed an Application for Review and Modification of the June 11, 1996 Award pursuant to K.S.A. 44-528. Whereupon, claimant filed a Motion to Quash Respondent's Application for Review and Modification and Request for Attorney's Fees. A hearing was held on claimant's motion but no record was made of that hearing. The November 7, 1996, Order by the Administrative Law Judge simply states "The Claimant's Motion to quash Respondent's motion for review and modification is denied." The Order is silent as to claimant's request for attorney fees. The issues for Appeals Board review are: (1) whether respondent may file for review and modification of an Award while an appeal to the Appeals Board is pending; and (2) claimant's entitlement to a reasonable attorney fee.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The respondent's Application for Review and Modification is pending before the Administrative Law Judge. No decision on that application has been made and no award has been entered. The appeal of the Administrative Law Judge's Award has now been decided by the Appeals Board and an Order entered dated December 27, 1996. Therefore, claimant's Motion to Quash Respondent's Application for Review is moot.

The issue of claimant's entitlement to a reasonable attorney fee should first be presented to and decided by the Administrative Law Judge. Absent such a determination, there is nothing for the Appeals Board to review. Accordingly, that issue is not ripe for determination by the Appeals Board.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the claimant's request for review of the November 7, 1996, Order entered by Administrative Law Judge John D. Clark should be, and is hereby, dismissed.

IT IS SO ORDERED.

Dated this ____ day of December 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Michael L. Snider, Wichita, KS
Douglas C. Hobbs, Wichita, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director